Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PAUL GUZMAN,

Petitioner,

v.

HENRY HUDSON, Director,
United States Marshals Service,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Petitioner have a liberty interest under the due process clause of the Fifth Amendment to the United States Constitution to be reinstated as a deputy marshal after having resigned from that position?

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The Petitioner respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the Court's decision and opinion entered on January 12, 1994 (App. A).

OPINIONS BELOW

On May 12, 1993, the United States District Court for the Northern District of Illinois, Eastern Division, granted the Respondent's motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted (App. C).

The basis for the Petitioner's claim was that pursuant to a policy statement of the United States Office of Personnel Management, entitled Information Concerning Reinstatement (the policy), specifically paragraphs 2 and 3 of that statement, the Petitioner qualified for "civil service status" by completing three years of substantial, continuous, creditable service for career appointment.

After the United States District Court for the Northern District of Illinois, Eastern Division, granted the motion to dismiss against the Petitioner (App. C), the Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois 60604, with the Appellate Court affirming the United States District Court's decision of dismissing the plaintiff's complaint for failure to state a cause of action.

JURISDICTION

1. The decision of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, was entered on January 12, 1994.

2. The federal question of the Petitioner's due process claim under the Fifth Amendment to the United States Constitution, for being reinstated as a United States Marshal after resigning from that post, was raised in the complaint filed with the United States District Court, Northern District of Illinois, Eastern Division.

3. The Petition for Writ of Certiorari was filed less than 90 days from the judgment of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on January 12, 1994.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment, Section 1: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner commenced his employment as a deputy with the United States Marshals Service in 1983, and continued that employment until June 1, 1989, when he resigned for personal reasons.

On November 13, 1990, the Petitioner forwarded a letter to one Jane Wyler, United States Marshals Service, Personnel Division, for the purpose of being reinstated.

In conjunction with the letter addressed to Ms. Wyler, certain documentation was forwarded to the Petitioner, which was completed, amended, and returned to the Respondent on or about January 1991.

The Petitioner did not hear from Ms. Wyler for several months, and thereafter, through his legal counsel, on October 7, 1991, requested reinstatement.

In reference to the correspondence of October 7, 1991, the Petitioner completed certain documentation and forwarded same to Ms. Pat Murphy.

On August 28, 1992, the Petitioner received correspondence from the United States Marshals Office that stated that he had been denied reinstatement as a Deputy U.S. Marshal.

Subsequent to August 28, 1992, the Petitioner has secured correspondence dated October 25, 1992, from the U.S. Department of Justice, indicating that the current budget requirements provide for the hiring of additional U.S. Deputy Marshals.

Based upon a policy statement of the United States Office of Personnel Management, entitled Information Concerning Reinstatement, Petitioner qualifies for consideration for reinstatement.

Pursuant to paragraphs 2 and 3 of that policy statement, entitled Information Concerning Reinstatement, the Petitioner has qualified for civil service status by completing three years of substantial, continuous, creditable service for career appointment, with the result that he has unlimited time for eligibility for reinstatement.

Pursuant to paragraph 11 of that policy statement, reinstatement to positions "which are required by law to be filled on a permanent basis are made with career tenure."

Prior to his resignation on June 1, 1989, the Petitioner had been rated as a good performer, as is reflected in correspondence of June 24, 1988, addressed to him by Eugene L. Coon, Jr., Chief of the Witness Security Division of the United States Marshals Service.

On information and belief, the Petitioner believes that from January of 1991 until August 28, 1992, the United States Marshals Service has hired hirees who did not have prior civil service status comparable to that of the Petitioner.

REASONS FOR GRANTING THE WRIT

THE PETITIONER HAS A LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO BE REINSTATED AS A DEPUTY MARSHAL AFTER HAVING RESIGNED FROM THAT POSITION.

On page 2 of the United States Court of Appeals, Seventh Circuit, published order, the United States Court of Appeals holds that, since the Petitioner had not alleged any discrimination, nor had he alleged that the failure to rehire him resulted in some stigmatization of him that deprived him of an opportunity to work in any capacity for the government, the Petitioner has not stated a cause of action for being reinstated.

Furthermore, on page 2 of the United States Court of Appeals opinion, citing *Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987), the Court states that a voluntary resignation does not invoke the procedures and rights under the Civil Service Reform Act for adverse agency actions that affect property interest.

Initially, it should be noted that the *Schultz v. United States Navy* decision is distinguishable, since, in *Schultz*, there was no expressed reinstatement policy based upon three years of substantial, continuous, and creditable service for career appointment relating to voluntary resignations.

Likewise, in the United States Court of Appeals opinion, the court cites *Hondros v. United States Civil Service Commission*, 720 F.2d 278, 281-82 (3d Cir. 1983), which decision concerns a probationary civil service employee who was not a qualified employee based upon three years of substantial, continuous, and creditable service,

thereby not entitling him to career tenure; consequently, the *Hondros* opinion is not applicable.

In addition, the United States Court of Appeals quotes from the policy statement that the reinstatement clause does not provide a liberty or property right:

> [r]einstatement is a privilege accorded in recognition of and on the basis of former service and is not a 'right' to which the former employee is entitled.

In order to analyze properly the opinion of the United States Court of Appeals for the Seventh Circuit, the United States Office of Personnel Management, Information Concerning Reinstatement, paragraphs 2 and 3 are quoted:

> 2. Competitive Status
> A competitive civil service status or competitive status is that status acquired after the employee has served a satisfactory probationary period under a career or career-conditional appointment (formerly called a Probational appointment). It may be accorded by statute, executive order, or the civil service rules upon the satisfactory completion of any required probationary period. To be eligible for reinstatement, one must have acquired competitive civil service status or have been serving the probationary period under a career or career-conditional appointment at the time of separation from that service.
>
> 3. Time Eligibility
> Persons who have a competitive status (or who have served under appointment leading to competitive status) and who are entitled to veteran preference have unlimited time eligibility for reinstatement. Former nonveteran employees who completed the three years of substantially continuous creditable service for career appointment also have unlimited time eligibility for reinstatement. Generally, the three-year period begins with other than a temporary appoint-

> ment to a position with the competitive service; it must include service under an appointment based on or conferring a competitive status or leading to a competitive status; it must not contain a single break in service of more than thirty calendar days

Pursuant to paragraph 11 of that policy statement, "Reinstatements to positions which are required by law to be filled on a permanent basis are made with career tenure."

The critical question is: What is the meaning of reinstatement?

On pages 2 and 3 of the unpublished order, the United States Court of Appeals for the Seventh Circuit rejects the Petitioner's theory that the analysis of the Illinois Municipal Code, Illinois Revised Statutes, 1990, Chapter 24, paragraph 10-2.1-18, now 65 ILCS 5/10-2.1-18 (1993), in conjunction with certain Illinois cited case law, is inapplicable because such statute applies to local government employees and not federal employees.

Nevertheless, the Petitioner contends that his theory is applicable and is pertinent, and for purposes of emphasis, the Petitioner cites pertinent language from the Illinois statute in question to support his position:

> If any positions which have been vacated because of reduction in forces or displacement and abolition of positions, are reinstated, such members and officers of the fire department or of the police department as are furloughed from the said positions shall be notified by the board by registered mail of such reinstatement of positions and shall have prior right to such positions if otherwise qualified, and in all cases seniority shall prevail.

In conjunction with the statute, that Petitioner also relies upon *Donnells v. Woodridge Police Pension Board*, 159 Ill.App.3d 735 (2d Dist. 1987), at 738, wherein the plain-

tiff Donnells had been reinstated to active service after being on medical leave.

In reversing the Circuit Court, the Appellate Court ruled, at 742, that reinstatement to active service after a medical leave of absence was not reappointment, with the Court defining reappointment as "synonymous with being rehired."

On the basis of the *Donnells* decision and the cited Illinois statute, it is apparent that the difference between reappointment and reinstatement is quite significant; in the first instance, there is a complete severance from employment, while in the second instance, there is a furlough from employment.

It is the contention of the Petitioner that the concept of furlough is embodied in the Definition (of reinstatement):

> "Reinstatement is a term used to describe the noncompetitive re-entry into the competitive service of a person who acquired eligibility for such action as a result of previous service."

Applying the above analysis to the Petitioner's position, although the Petitioner does not "have a right" to reinstatement, pursuant to a property right, *Begg v. Moffitt*, 555 F. Supp. 1344, 1348 (1983), yet the policy statement defines reinstatement as a privilege, resulting in a preference for re-entry into the Marshals Service, particularly when it describes the reinstatement as *noncompetitive* with the denial of such reinstatement a deprivation of the liberty right by excluding the Petitioner from the occupation of a deputy marshal. *Bigby v. City of Chicago*, 766 F.2d 1053 (1985), and *Illinois Psychological Association v. Falk*, 818 F.2d 1337 (7th Cir. 1987).

Unlike in *Bigby v. City of Chicago*, 766 F.2d 1053 (1985), at 1057, wherein the plaintiffs were denied lieutenants'

promotions, but retained their police occupations, or unlike in *Illinois Psychological Association v. Falk*, 818 F.2d 1337 (7th Cir. 1987), at 1344, wherein the plaintiff was denied membership on a hospital medical staff but retained his license to practice as a psychologist, herein the Petitioner was denied retention of his occupation, based upon preference to reinstatement.

Such preference to reinstatement is analogous and comparable to that of a firefighter or police officer who has a preference to reinstatement based upon seniority.

Furthermore, the Petitioner alleged in his Complaint that under the policy statement, he is eligible for reinstatement, since he has completed three years of substantial, continuous, creditable service for career appointment, which entitles him to an unlimited time for eligibility for reinstatement.

Significantly, in Petitioner's Complaint, quoting the policy statement, entitled Tenure, the last paragraph states: "Reinstatement to positions which are required to be filled on a permanent basis are made with career tenure."

As a result, in conjunction with *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), the policy language is mandatory based upon career tenure preference, thereby creating a liberty interest under the due process clause of the Fifth Amendment to the United States Constitution.

Therefore, the United States Court of Appeals, Seventh Circuit, reliance upon *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972), page A-3 of its unpublished order, is inapplicable, since the Petitioner contends that he was not seeking rehiring, but a reinstating of his position with the U.S. Marshals Service.

As a result, the United States District Court decision should have been postured upon *Perry v. Sindermann*, 408 U.S. 593 (1972), at 601-603, wherein the United States Supreme Court states:

> We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution."

In this instance, the Petitioner has pointed to an enunciated policy of the Respondent which provides for reinstatement based upon completion of three years of substantial, continuous, creditable service for career appointment, which conditions the Petitioner has met.

In conjunction with the above, the additional factor that reinstatement is not conditioned upon competing for a United States Deputy Marshal's position, as hirees are required to do via testing processes, buttresses the Petitioner's argument that the policy statement, herein, established a liberty interest in occupation, which liberty interest was violated via the due process clause of the Fifth Amendment to the United States Constitution by the Respondent rejecting the Petitioner's application for reinstatement.

CONCLUSION

For the above stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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